IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1128

BERTRAM L. PODELL,

Petitioner,

—v.—

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Preliminary Statement

Respondent's brief is submitted in opposition to the petition for a Writ of Certiorari to review the order of the New York Court of Appeals, entered October 19, 1978 denying petitioner's motion for leave to appeal to that Court from an Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial

Department, entered March 13, 1978, which struck petitioner's name from the roll of attorneys of the State of New York (*Matter of Bertram L. Podell,* 61 A.D.2d 1019, 45 N.Y.2d 711). An application for leave to appeal to the Court of Appeals of New York had been denied on June 16, 1978 by the Appellate Division, Second Department.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C. 2101.

Statement of the Case

Petitioner, Bertram L. Podell, was admitted to practice as an attorney and counselor at law in the Courts of the State of New York by the Appellate Division of the Supreme Court, Second Judicial Department, on December 14, 1949.

On July 12, 1973, petitioner was charged under a ten (10) count indictment, returned in the United States District Court for the Southern District of New York with various violations of Title 18 of the United States Code. On January 9, 1975, petitioner pled guilty to two counts of the indictment to wit, counts one and five (b) and (c)) and was convicted of the crimes of Conspiracy to Defraud the United States of America (Title 18, U.S.C. 371) and Conflict of Interests (Title 18, U.S.C. 203(A)(2)). The crimes of which petitioner was convicted were both federal felonies.

The indictment charged, *inter alia,* that petitioner while a Member of Congress, from in or about March 1969 to the date of the indictment, conspired to defraud the United States and its agencies by "affecting, inducing and pres-

suring" officials of federal agencies in the performance of their duties in connection with the awarding of air routes for air travel, in violation of 18 U.S.C. 371. The indictment further charged that in the period from December 1968 to September 1970, petitioner agreed to receive and did receive money and other things of value in attempting to influence federal agencies in favor of a client while he was a Member of Congress. These charges were specifically set forth in counts one and five (b) and (c) of the indictment.

On June 24, 1975, petitioner's judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit (519 F 2nd 144).

On November 3, 1975, petitioner's petition for a writ of certiorari was denied by the United States Supreme Court (423 U.S. 926 cert. den.)

On February 6, 1975, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, authorized respondent herein to institute a disciplinary proceeding against petitioner based upon his federal conviction, and a proceeding was instituted in that Court November 9, 1976. Petitioner filed an answer thereto, and the Appellate Division, by order dated February 7, 1977 referred the issues raised by the petition and answer to the Honorable Daniel S. Albert, a Justice of the Supreme Court, as Referee, to hear and report, together with his findings on said issues. Justice Albert held hearings and filed his report with the Appellate Division, Second Department on August 1, 1977, together with a transcript of the hearings and the exhibits.[1]

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[1] In his summary of the report, petitioner neglects to make mention of Justice Albert, in *sustaining the charges* preferred against

(Footnote continued on following page)

On October 13, 1977, the New York Court of Appeals rendered its decision in *Matter of Chu*, 42 N.Y. 2nd 490, holding in a case concerning an attorney convicted of a federal felony:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment [pursuant to §90 (4) of the Judiciary Law]."

In October, 1977, petitioner herein moved to confirm the Referee's findings and recommendations and to dismiss the proceeding against him or, in the alternative, to dismiss the proceeding on constitutional grounds (i.e. deprivation of due process and equal protection of the law). Respondent cross-moved to vacate the Appellate Division's order dated February 6, 1975 which had authorized the institution of the proceeding, and to strike petitioner's name from the roll of attorneys on the grounds that he had been disbarred by virtue of a felony conviction. Petitioner submitted memoranda of law both in support of his motion and in opposition to respondent's cross motion urging, *inter alia*, that the application of *Chu* to petitioner would violate the constitutional prohibition against *ex post facto* laws.

(Footnote continued from preceding page)

petitioner, found that "there is no question that an elected public official, occupying a high position of public trust, as respondent did, should not engage in acts which have as their purpose influencing government agencies and that violations of the federal conflict of interests statute should not be treated lightly. (*U. S.* v. *Quinn*, 141 F. Sup. 622 (S.D.N.Y.); *U. S.* v. *Adams*, 115 F. Sup. 731 (B.N.D.). It is beyond cavil that a public official who sells influence commits a serious breach of the public trust."

By order dated March 13, 1978, the Appellate Division, Second Department denied petitioner's motion and granted respondent's cross-motion and ordered petitioner's name struck from the rolls of attorneys and counselors at law by virtue of said felony conviction.

On April 27, 1978, petitioner moved for leave to appeal to the Court of Appeals in the Appellate Division, Second Department and set forth his constitutional objections. In an affidavit in opposition submitted by respondent to petitioner's motion, respondent noted the court's prior decisions in denying motions for leave to appeal where similar constitutional objections were raised (*Matter of Peltz*, Motion for Leave to Appeal Denied, Application as of Right Dismissed and Stay Dismissed, 43 N.Y. 2nd 646, 844; *Matter of Davis*, Motion for Leave to Appeal Denied, 44 N.Y. 2nd 646, March 23, 1978; *Matter of Cahn*, Motion for Leave to Appeal Denied, 44 N.Y. 2nd 641, March 28, 1978.).

By order dated June 16, 1978, the Appellate Division, Second Department, denied petitioner's motion for leave to appeal to the Court of Appeals. Petitioner, thereafter moved in the New York Court of Appeals for leave to appeal from the Appellate Division's order of disbarment. Once more petitioner's constitutional objections were raised and rejected by that Court which denied petitioner's motion on October 19, 1978.

The lack of an accompanying opinion to the decisions of the Appellate Division, in disbarring petitioner, and the denial of petitioner's motions for leave to appeal by the Appellate Division and the New York Court of Appeals, is far from evidence that petitioner's constitutional arguments were not considered in the determination of those motions. Rather, since petitioner presented these identical issues to each of the respective courts along the path to this application, if these questions of constitutionality were as probative as to require the granting of this petition,

the Courts below would have recognized them. Further, it is respondent's position herein that, implicit in the lower court's denials of petitioner's motions for leave to appeal, is the finding that the procedures prescribed by §90 (4) of the Judiciary Law, as interpreted by the Courts of the State of New York and indeed the U.S. Supreme Court itself, are not violative of petitioner's constitutional rights.

Neither the Automatic Disbarment Statute (Judiciary Law, Section 90, subdivision 4), nor New York's interpretation thereof (*Matter of Chu*, 42 N.Y.2d 490), infringes upon any constitutionally protected right.

1. Retrospective Application of the New York Court of Appeals' Decision in *Matter of Chu* (supra), does not Constitute an Ex Post Facto Law and Bill of Attainder.

New York Judiciary Law Section 90, subdivision 4, provides as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a

felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'" (supra at 292).

On October 13, 1977, the New York Court of Appeals modified the *Donegan* ruling in *Matter of Chu,* stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan* was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493).

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* 45 N.Y.2d 866, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that

it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Since the disciplinary proceeding predicated upon petitioner's conviction was not finally adjudicated at the time of the Court of Appeals decision in *Chu*, that ruling was held to apply to petitioner and his name was stricken from the roll of attorneys.

Petitioner's contention, that the application of the *Chu* ruling to him constitutes an *ex post facto* law and bill of attainder, is wholly without merit.

An ex post facto law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to ex post facto laws has long been held by this Court to apply solely to criminal statutes (*Baltimore & S.R. Co.* v. *Nesbit*, 51 U.S. 395, see also, *Mahler* v. *Eby*, 264 U.S. 32) and for this reason, petitioner's reliance on *Bouie* v. *City of Columbia* (378 U.S. 347) is unfounded.[2] The Supreme Court's decision in the *Bouie* case was based upon a determination that "if a judicial construction of a criminal statute

[2] Disciplinary proceedings have consistently been held to be civil in nature (*Matter of Zuckerman*, 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968]), and are not considered to be criminal (*Matter of Unger*, 27 AD2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect" (supra at 354). The case at bar is neither a criminal one nor was the decision in *Chu* either "unexpected" or "indefensible." Judiciary Law, Section 90, has not changed, only the interpretation thereof vis a vis *Matter of Donegan* (supra) has changed, and for this reason petitioner's reliance on *Matter of Garland* (71 U.S. 333) is unfounded.

Petitioner's argument that the *Chu* ruling should not be applied retroactively in petitioner"s case further ignores the fact that it has long been the law that new or revised principles of decisional law apply to all cases not finally adjudicated and in which litigation is pending (*People* v. *Morales*, 37 NY2d 262). In the *Morales* case, the New York Court of Appeals, relying upon authority of this Court, discussed the common-law concept of retroactivity as follows:

> "The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated. (Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 58.) Consequently, since the 'correct' law was looked upon as having always been the same, a case decided on direct appeal always received the benefit, or detriment, of any decisional law 'pronounced' before its judgment became final. (See *United States* v. *Schooner Peggy*, 1 Cranch [5 U.S.] 103, 110.) However, once a judgment had become final, it was not affected by law freshly 'pronounced' thereafter. (1 Blackstone's Commentaries 69 [15th

ed.]; 1 Black, Judgments [2d ed.], §§245, 246.)" (Supra at p. 268.)

Similarly, rulings of this Court in *Mullany* v. *Wilbur*, 421 U.S. 684 (see *People* v. *Davis*, 49 AD2d 437) and *Morrissey* v. *Brewer*, 408 U.S. 471 (see *People Ex Rel Gambino* v. *Warden*, 43 AD2d 409) have been applied retroactively.

Indeed the law with respect to retroactivity is as stated by this Court in *Linkletter* v. *Walker*, 381 U.S. 618, that, "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, *Schooner Peggy*, supra . . ." and ". . . no distinction (is) drawn between civil and criminal litigation . . ." (supra at 627).

In attempting to construe Judiciary Law §90(4) as a bill of attainder, petitioner ignores the prerequisites contained in the definition cited: "A legislative act which inflicts punishment *without judicial trial*", *Cummings* v. *The State of Missouri*, 71 U.S. (4 Wall.) 277 (1867). Judiciary Law §90(4) requires that an attorney be stricken from the rolls after the attorney has been convicted of a felony *at a judicial trial.* The *Cummings* decision involved a legislative act which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession. The "punishment", the exclusion from the practice of a profession, was predicated upon the mere failure of the applicant to take the prescribed oath with judicial intervention totally absent in the process of the execution of the statute. Surely this is not the case, where as a prerequisite to the operation of Judiciary Law §90(4), an attorney is first tried in a court of law with all of the attendant constitutional protection afforded a criminal defendant, and is then adjudged, beyond a reasonable doubt, to have been guilty of a felony crime.

The Courts of New York have specifically disposed of petitioner's "Separation of Powers" argument, noting that the statute (§90) is merely "declaratory of a jurisdiction [power of the courts to regulate attorneys] that would have been implied" (*People ex rel. Karlin* v. *Culkin*, 248 N.Y. 465, 477; *Gair* v. *Peck*, 6 N.Y.2d 97, 110, cert den 361 U.S. 374).

2. Judiciary Law §90(4) Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner seeks to review, in a civil disciplinary hearing, his conviction of federal felony crimes which has already been affirmed after appellate review and which the United States Supreme Court itself declined to consider upon his previous Petition for Certiorari.

The State of New York has a compelling interest in regulating the practice of professions within its boundaries and is given wide latitude in determining what standards are appropriate for such regulation (*Goldfarb* v. *Virginia St. Bar*, 421 U.S. 773, 792 [1975]).

The interest of any state in the regulation of the practice of law is particularly important. The quality of the practice of law has a vital effect upon the public welfare. The requirement of high standards for attorneys is necessary not only to assure the orderly and efficient administration of justice but also to assure the public of proper counseling and representation. There are few areas of activity which do not have serious legal implications and the authority and responsibility conferred upon attorneys is ex-

traordinary (*Ibid.; Schware* v. *Bd. of Bar Examiners,* 353 U.S. 232, 247 [1957] [Frankfurter, J., concurring]).

Respondent recognizes that the power of a state to regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Konigsberg* v. *Bd. of Examiners,* 353 U.S. 252, 273 [1957]). Respondent also recognizes that it may not be exercised in a way which infringes upon constitutional rights (*Bates* v. *St. Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691 [1977]; *United Transportation Un.* v. *St. Bar of Michigan,* 401 U.S. 576 [1971]). So long as the state does not exercise its power in such a manner, however, it has autonomous control over the practice of law (*Theard* v. *United States,* 354 U.S. 278, 281 [1957]).

Neither the automatic disbarment statute (Judiciary Law, Section 90, subdivision 4), nor the interpretation thereof by the New York Court of Appeals (*Matter of Chu, infra*), infringes upon any constitutionally protected right. The "right" to practice law may well be an important property or liberty interest within the meaning of the due process clause. It is not a right, however, which has specific constitutional protection. A state may properly adopt a law which adversely affects important property or liberty interests (*San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 31 [1937]). The Constitution merely requires that the legislation be addressed to a legitimate end and that the means taken are reasonable and appropriate to that end. This Court has defined specific Fourteenth Amendment guidelines as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426; (see also: *Rankin* v. *Shankar,* 23 N.Y.2d 111, 119).

The legislature of New York State has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh,* 25 A.D. 2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell,* 40 N.Y.2d 153, quoting Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 471 [Cardozo, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice Bradley, writing nearly one hundred

years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall*, 107 U.S. 265, 274.)" (*supra* at 156)

Moreover, the constitutionality of Judiciary Law, Section 90, in general and subdivision 4 thereof, in particular has been repeatedly upheld (*Mildner* v. *Gulotta*, 405 F. Supp.182, affd 425 U.S. 901; *Gerzof* v. *Gulotta*, 57 A.D. 2d 821, mot for lv to app den, 42 N.Y.2d 960; *Matter of Abrams*, 38 A.D.2d 334; *Matter of Glucksman*, 57 A.D.2d 205; see also: *Matter of Mitchell, supra*).

In *Gerzof*, the Court specifically stated:

"Moreover, it should be emphasized that the United States Supreme Court has found that section 90 does not violate the Federal Constitution . . ." (*supra* at 822).

To the same effect, the Court in Abrams specifically upheld the constitutionality of the automatic disbarment provision:

"Although subdivision 4 of section 90 provides for automatic disbarment upon conviction (*Matter of Barash*, 20 N.Y.2d 154 [1967] respondent's constitutional guarantee of due process is safeguarded

by his jury trial and appellate review" (*supra* at 336).

This Court has denied each and every petition for certiorari thus far presented, based upon the same claims of constitutional infirmities, by attorneys who were stricken from the Roll of Attorneys pursuant to Judiciary Law, § 90, subdivision 4, based upon their conviction of federal felonies. *Peltz* v. *Joint Bar Association Grievance Committee*, 60 AD 2d 587, mot. lv. to app. den. 43 N.Y. 2d 646, cert. den. May 3, 1978, 436 U.S. 926; *Davis* v. *Joint Bar Association Grievance Committee*, 60 AD 2d 613, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. October 2, 1978, —— U.S. ——; *Rosenberg* v. *Joint Bar Association Grievance Committee*, 62 AD 2d 1065, mot. lv. to app. den. 44 N.Y. 2d 648, cert. den. October 30, 1978 —— U.S. ——; *Cahn* v. *Joint Bar Association Grievance Committee*, 59 AD 2d 179, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. January 8, 1979, —— U.S. ——; *Fayer* v. *Joint Bar Association Grievance Committee*, 63 AD 2d 709, mot. lv. to app. den. 45 N.Y. 2d 708, cert. den. January 8, 1979, —— U.S. ——.

Petitioner's reliance on *Matter of Ming*, 469 F 2d 1352 (7th Cir. 1972) and *Matter of Jones*, 506 2d 527 (8th Cir. 1974) on support of his due process objection is unfounded. In *Ming*, the Seventh Circuit failed to apply a *Court rule* requiring a summary suspension, where the attorney had been found guilty of a Federal misdemeanor. Section 90(4) is clearly applicable only to felony convictions. The District Court, in *Ming*, specifically noted the existence of a Court rule requiring summary discipline on the basis of a felony conviction and noted no constitutional infirmity with respect to such rule.

The Eighth's Circuit's holding in *Jones* that a *Court Rule* providing for summary disbarment upon a felony conviction was violative of due process is inconsistent with

this Court's denials of petitions for certiorari presented by attorneys who were stricken from the Roll of Attorneys pursuant to Judiciary Law §90(4).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
March 27, 1979

Respectfully submitted,

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